DUI SEMINAR

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MOTION PRACTICE HIGHLIGHTS

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Motion Practice Highlight

DUI: BAC & Beyond

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-APAAC on Demand Presentations

- Basic Motion Practice
 - Rules (pre & post trial)
 - Substantive issues Rule 8, voluntariness, Miranda, right to counsel
 - · Suggestions for evidentiary hearing
- · Corpus Delicti Rule
 - The Standard
 - · Motions in limine
 - Hearsay
 - DUI
- Search & Seizure for Traffic Cases
- Discovery
 - Overview
 - Responding to defense motions to compel & for sanctions
 - · The standard

General Reminders

Know & Use the Rules & the Comments

- ✓ Rule 15.7(b)
- > No sanctions hearing w/o good faith certificate
- ✓ Rule 15.2(a)(8)
- Def, shall at any time submit to reasonable physical exam (HGN)
- ✓ Rule 32
- ✓ Time limits & preclusion ✓ Summary disposition 32...6(c)
- ✓ Rules 16.1 & 16.2
- ✓ Rule 35.1
- ✓ Rules specific to your issue



RULES OF ENGAGEMENT	
On questions of admissibility, the Court "is not bound by the Rules of Evidence, except those	
with respect to privileges"	
Rule 104(a) Rules of Evid.	
Hearsay is admissible in MOST motion hearings	
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Do Drocetive	
Be Proactive	
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Motions in limine – Examples	
Absent Expert (criminalist)	
• Rogovich; State v. Karp (Voris, RPI) 236 Ariz. 120 (App. 2013)	
Prescription Drug Cases	
Hearsay	
Relevance/preclude	
28-1381(D) = correct doctor (remember formal discovery)	
Micro Clots	
Corpus Delicti	
Preclude Intent Arguments	
APC & Marijuana cases	
Ambien – sleep driving	
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Motions in limine - Examples	
· '	
Guthrie/Cooperman Appl basehimment and applications	·
• 2100/1, RFI, breathing pattern, temp, source code, etc.	
Medical Marijuana – create new ones Marijuana – Create new ones	
Use of Fermentation in Cadavers Studies	
Preclude self-serving hearsay	
Be pro-active!	
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Second Sample - KEEN	
If defendant :	
1) requests & obtains a sample for his/her own use &/or 2) attacks validity of State's test	
State may:	
* cross-examination about receiving second sample, &	
 comment on defendant's failure to produce evidence of second sample results at trial (reasonable inference 	
against them). State ex rel. McDougall v. Corcoran (Keen, RPI), 153 Ariz. 157 (1987).	
Maic or ret. McDougen & Corcoran (Recn, RP1), 153 Anz. 157 (1987). If they test and notice an expert, file motion for disclosure.	
Tilley see and reside at support, the motion for discussing.	
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Keen	
Make sure there is enough blood left for	
testing before making this argument	
	· · · · · · · · · · · · · · · · · · ·
Remember – Proceed with	
Caution!	
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Use a Motion in limine	
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Responding	to	Defense
Motions		

Don't Automatically Buy Into Defense Arguments

- Evaluate With a Critical Eye
- Examples of Erroneous Def. arguments:
 - Rule 702 applies to FSTs, all of the DRE examination, NHTSA cues, etc.
 - State has to collect sample of blood for defendant
 - Uncertainty budget affects admissibility
 - "Due diligence" applies to Rule 8
 - Rule 8 violations result in dismissal with prejudice

Reminder

Ask - Does 4th Amendment Apply?

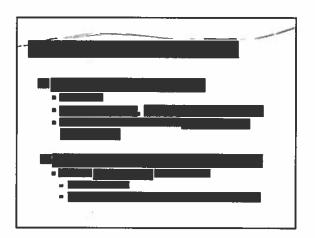
- 1) Did defendant have an expectation of privacy?
- 2) Was there a search or seizure?
- 3) Was there State action?

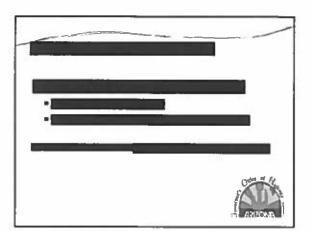
If so - was it reasonable, is there a warrant exception?

Remedy is suppression - not dismissal

4th-Amendment Reminders

- Exclusionary Rule (suppression) is NOT automatic for a violation
 - Herring v. US, 555 U.S. 35 (2009).
 - If relying on overturned precedent Davis v. US, 564 U.S. ___ (2011)
- · Good Faith
- Inevitable discovery. State v. Rojers, 216 Ariz. 555 (App. 2007)
- Inventory search (include its police policy)
- · Look for no stop Robles
- · AZ no tougher than feds except for home searches





A Swerve IS Enough to Stop

- State v. Superior Court (Blake) 149 Ariz. 269 (1986) (weaving within one's lane).
- Distinguish State v. Livingston, 206 Ariz. 145 (App. 2003).
 - one swerve
 - officer's training & experience
 - signs & symptoms of impairment
 - curvy vs. straight road
 - NHTSA cues

Motions to Suppress Breath/Blood Tests

All State is required to do is lay basic foundation.
 Any remaining issues go to weight, not admissibility, of evidence.

State v. Plew, 155 Ariz. 44 (1987); State v. Superior Court (Weant, RPI), 172 Ariz. 153 (App. 1992).

A.R.S. 28-1323(B)

Phlebotomist is qualified person is not foundational

Is It A Question of Fact?

- Did it or did it not happen?
- All questions of fact are for the jury
 - Gum in the defendant's mouth
 - Deprivation period issues



Battle of the Experts

- Disagreements between experts go to weight, not admissibility. State v. Velasco, (Alday, RPI), 165 Ariz. 480, 486 (1990).
- Where there is a lack of unanimity in scientific community on accuracy of breath test, "the scientific disagreement affects only the weight and not the admissibility of evidence." State v. Olivas, 77 Ariz, 118 (1954).

Battle of the Experts

- The determination of the credibility of witnesses is a question for the jury.
- State v. King, 213 Ariz, 632 (App. 2006)
- D State v. Rivera, 116 Ariz, 449 (1977)
- 6 Rule 702 comments

Deprivation Period

- "[A] failure to continuously observe a defendant for 20 minutes prior to the administration of the test goes to the weight to be accorded the results of the test." State v. Corrales, 135 Ariz, 105, 106 (App. 1982).
- Deprivation period is contained on the checklist. A.R.S. 28-1323(A)(4) specifically provides testimony of operator is sufficient to establish this requirement. State v. King, 213 Ariz. 632 (App. 2006).

Missing/Defective SQAPs

Only need periodic records.

State v. Duber, 187 Ariz, 425 (App. 1996); State v. Superior Court (Stock, RPI), 181 Ariz. 202 (1995).

ARS § 28-1323(A)(5) – multiple ways to satisfy • SQAPS • Calibrations

- Bracketing calibrations on breath card
 [Testimony of Criminalist]



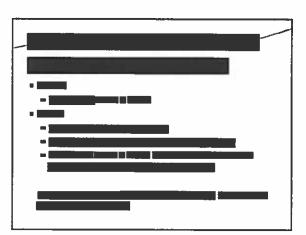
-Independent Chemical Test

No requirement to advise defendant of this right, unless State chooses:

- 1) not to invoke implied consent law; and
- 2) not to conduct chemical test.

Montano v. Superior Court, 149 Ariz. 385 (1986); Mack v. Cruikshank, 196 Ariz, 541 (App. 1999).





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What if I Lose?	
Appeal, Special Action, Proceed	
Anyway?	
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- Cannot Use the Constitution as a Shield & a Sword	
Harris v. New York, 91 S.Ct. 643 (1971)	
United States v. Havens, 100 S.Ct. 1912 (1980) State v. Menard, 135 Ariz. 385 (App. 1983) State v. Fortier, 149 Vt. 599, 547 A.2d 1327 (1988)	<u> </u>
Suppressed evidence can be used	
to impeach.	
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What If I Lose?	
Ensure Record is Good On the record	
Diagrams are admitted and labeled Do not waive arguments for appeal	
Make offers of proof Don't just pick one argument	
Get Judge to Give Basis for RulingMotion to Reconsider	
 Control the Standard of Review Through Stipulations 	

Appeal or Special Action?

- Right to Appeal?
 - ARS § 13-4032
 - ARS § 13-4032(6) State may appeal orders granting motions to suppress
 - State v. Roper, 225 Ariz. 273 (App. 2010) & State v. Bejarano, 219 Ariz. 518 (App. 2008) [relied on Lelevier – mtn to suppress challenges only the constitutionality of obtaining evidence.]
 - But see, State v. Rodriguez, 126 Ariz. 28 (1980) & State v. Rodriguez, 160 Ariz. 381 (App. 1989)
- May Need to Take a Special Action

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